Supreme Court, U.S.
FILED
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SANSAN DEWI CHANDRA TJONG –
PETITIONER,

VS.

U. S. COURT OF APPEALS FOR THE SIXTH
CIRCUIT – RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's Petition for Panel Rehearing should have been granted by the US Court of Appeals for the Sixth Circuit because Petitioner has complied with the procedure requirements for the Motion to Reopen she filed with the Board of Immigration Appeals?

2. Whether the Sixth Circuit Court was error in denying Petitioner's Petition for Panel Rehearing because it was fundamentally unfair and prejudicial to the Petitioner?

CERTIFICATE OF INTERESTED PERSONS

AND

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Petitioner, in compliance with Rule 14(b) and rule 29.6 of the Rules of the Supreme Court of the United States, certifies the following listed person and parties have an interest in the outcome of this case:

1. US Court of Appeals for the Sixth Circuit, Respondent
2. Eric H. Holder, Jr., U.S. Attorney General,
3. David Schor, Attorney for Respondent
4. Aviva L. Poczter, Attorney for Respondent
5. The Board of Immigration Appeals
6. Charles E. Pazar, Immigration Judge
7. Cindy S. Chang, Attorney for Petitioner
8. Sansan Dewi Chandra Tjong, Petitioner

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STATEMENT OF JURISDICTION

On March 25, 2009, the US Court of Appeals for the Sixth Circuit denied the Petitioner's petition for panel rehearing. This Court's jurisdiction to grant the review on a writ of certiorari is discretional. The judicial discretion is warranted here because there are legal questions of exceptional importance involved in this case.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1. 8 U.S.C. Sections 1229a (b)
2. 8 C.F.R. Section 240.3

STATEMENT OF THE CASE

This is an immigration case. Petitioner is a native and citizen of Indonesia. Petitioner petitions for a writ of certiorari on the decision rendered by the US Court of Appeals for the Sixth Circuit on March 25, 2009.

Petitioner was admitted to the United States on July 11, 2000 as a nonimmigrant visitor with authorization to remain until January 1, 2001. Petitioner overstayed her visa and was placed in removal proceedings. As a Chinese Buddhist Indonesian woman, Petitioner had suffered persecution in Indonesia; she applied for relief from removal to Indonesia in

the form of asylum, withholding of removal under Immigration and Nationality Act and under the Convention against Torture.

On January 24, 2006, the Immigration Judge ("IJ") issued an order denying petitioner's application for asylum and withholding of removal. Petitioner, through her former counsel, appealed to the Board of Immigration Appeals ("BIA").

On May 31, 2007, BIA issued a decision and dismissed Petitioner's appeal. However, Petitioner's former counsel never informed her about that decision. Petitioner finally learned about the BIA's decision in September 2007 when she tried to apply for her employment authorization.

Thereafter, Petitioner filed a Motion to Reopen to BIA on the basis that her former counsel's failure to inform her about the BIA's decision constitutes the ineffective assistance of counsel.

On March 25, 2008, BIA denied the Motion stating that the Motion did not comply with the procedural requirements and she did not demonstrate prejudice.

Through the undersigned counsel, Petitioner filed a timely Petition for Review to the US Court of Appeals for the Sixth Circuit Court.

The Sixth Circuit Court denied that petition on January 30, 2009. Petitioner then filed a Petition for Panel Rehearing.

Unfortunately that petition was denied on March 25, 2009.

ARGUMENT

Individuals subject to removal proceedings have certain constitutional and statutory rights. In Accardi v. Shaughnessy, 347 U.S. 260 (1954) the Court held that due process protections under the Fifth Amendment extend to Non-citizens who entered the United States, whether lawfully or unlawfully.

A person in removal (formerly deportation) proceeding is entitled to full due process. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." See Reno v. Flores, 507 U.S. 292, 306 (1993).

Non-citizens do not have a Sixth Amendment right to be represented in removal proceedings. Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988). However, the right to counsel in removal proceedings is grounded in the Fifth Amendment's guarantee of due process. Prichard-Ciriza v. INS, 978 F.2d 219,222 (5th Cir. 1992); 8 U.S.C. Section 1229a(b); 8 C.F.R. Section 240.3. In the asylum context, the right to counsel has been characterized as "Fundamental". Orantes-Hernadez v. Thornburgh, 919 F.2d 549,554 (9th Cir. 1990).

In this case, Petitioner's constitutional rights were violated because her former counsel was ineffective. Petitioner has complied with the procedural requirements in filing the Motion to BIA. Further, her former counsel's ineffective

assistance prejudiced her in that she is facing a more difficult time regarding her removal proceedings. Therefore, the US Court of Appeals for the Sixth Circuit erred in denying Petitioner's Motion to Reopen.

1. Petitioner has complied with the procedural requirements when she filed the Motion to Reopen to BIA.

To support her Motion to Reopen on the ground of ineffective assistance of counsel, Petitioner has filed a formal complaint to the State Bar of Tennessee, which is the appropriate authority, against her former counsel. With that formal complaint, Petitioner has filed an affidavit detailing the counsel's failings. Petitioner then sent a copy of the said complaint and the affidavit to her former counsel, which served as notice to counsel regarding the allegations. Therefore, Petitioner has complied with the procedural requirements according to Matter of Lozada, 19 INA Dec. 637,639 (BIA 1988).

2. Petitioner has suffered prejudice by former counsel's inactions.

Under Sako v. Gonzales, 434 F.3d 857, 859 (6th Cir. 2006), to prevail in the claim, the alien must show that counsel's ineffective assistance "prejudiced him or denied him fundamental fairness." Here, Petitioner was placed into removal proceedings because she overstayed her

visa because she was, and still is, afraid of returning to her home country, Indonesia. Petitioner applied for relief in the form of asylum because she had suffered persecution in Indonesia on account of her race and religion.

In the removal proceedings, there are strict filing deadlines to follow. The fact that the Petitioner's former counsel failed to inform her about the BIA's negative decision on her appeal and caused her to miss the filing deadline to file her petition to the higher court jeopardized her immigration case tremendously.

Because of her former counsel's ineffective assistance, Petitioner's removal proceedings became more complicated. Petitioner has had to retain another counsel to file appropriate motions to save her case. Petitioner has suffered emotional turmoil that her case would be denied and she would be deported.

Because of the former counsel's failure to act diligently, which is to inform her in a timely fashion, about the crucial information in her removal proceedings, Petitioner is facing more troubles and difficulties with the immigration authority. Under the circumstances, it is fundamentally unfair to deny Petitioner's Motion to Reopen.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests this Petition for a Writ of Certiorari be granted.

Dated: June 16, 2009 Respectfully Submitted,

By: /S/

Cindy S. Chang, Esq.
Attorney for Petitioner,
Sansan Dewi Chandra Tjong

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Case No. 08-3425

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

SANSAN DEWI CHANDRA TJONG, Petitioner

v.

ERIC H. HOLDER, JR., Attorney General, Respondent

BEFORE: GIBBONS, Circuit Judge; MCKEAGUE, Circuit Judge; SHADUR, U.S. District Judge*;

Upon consideration of the petition for rehearing filed by the petitioner,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued: March 25, 2009

*The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 08-3425

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANSAN DEWI CHANDRA TJONG, Petitioner,

v.

MICHAEL B. MUKASEY, Respondent.

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

Before: GIBBONS and McKEAGUE, Circuit Judges; SHADUR, District Judge.*

JULIA SMITH GIBBONS, Circuit Judge. Petitioner SansanDewi Chandra Tjong appeals the decision of the Board of Immigration Appeals ("BIA") denying her motion to reopen. Tjong, a native and citizen of Indonesia, applied for asylum based on alleged persecution on account of her religion and ethnicity. Her petition was denied by the Immigration Judge ("IJ") and by the BIA.

*The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

Tjong then filed a motion to reopen, arguing that her former counsel was ineffective for failing to inform her of the BIA's adverse decision on her appeal, which caused her to lose her right to appeal to this court. The BIA denied the motion, finding that Tjong had not complied with procedural requirements for an ineffectiveness claim and that she had not demonstrated prejudice. Because we agree, we affirm the denial of Tjong's motion to reopen.

I

Tjong first came to the United States from her native Indonesia in 1997 on a student visa. She graduated from the University of Central Arkansas and remained lawfully in the United States to pursue optional practical training until February 15,2003. Tjong filed an application for asylum, withholding of removal, and protection under the Convention Against Torture in October 2004, approximately one and one half years after her lawful status expired. The basis for Tjong's asylum claim was her contention that she was persecuted by Muslim Indonesians because she is Buddhist and ethnically Chinese. In support of this claim, Tjong recounted that while attending middle school, native Indonesians taunted her and touched her inappropriately. Tjong further stated that she had been attacked in high school when a group of people threw stones at her. She also recalled that in 1997 native Indonesians spread nails on the road on which' she was driving, causing her to suffer a flat tire, and then stole the contents of her car. Finally, Tjong reported that in 2000 she was riding in a taxicab when protesters knocked on the cab windows, frightening her.

Tjong, represented by T. Darnell Flowers, appeared before an IJ. Although the IJ found Tjong to be

credible, he denied her application for asylum, finding that it was untimely because it was filed more than one year after Tjong entered the United States. Alternatively, the IJ found that Tjong was not eligible for asylum because she had not established a well-founded fear of persecution. He further determined that Tjong's asylum application was in essence a request for withholding of removal, but that Tjong was not eligible for withholding, nor was she entitled to protection under the Convention Against Torture. The IJ concluded that the incidents described by Tjong amounted to ordinary crime, not evidence of persecution.

Tjong appealed the decision of the IJ to the BIA. The BIA affirmed the decision of the IJ, agreeing that Tjong's asylum application was untimely. A final order for voluntary departure was issued on May 31, 2007.

On September 24,2007, Tjong filed a motion to reopen her application for asylum. Tjong claimed that Flowers provided ineffective assistance of counsel because Flowers never informed her of the BIA's decision denying her appeal. According to Tjong, she did not learn of the BIA'S adverse decision until August 2007, well after the thirty-day period to appeal to this court had expired. Tjong,argued that she was prejudiced by Flowers's error because it prevented her from filing a timely appeal in this court. The.BIA denied the motion to reopen, finding that Tjong had not complied with the procedural requirements of *Matter of Lozada,* 19 I. & N. Dec. 637, 639 (BIA 1988) and that she had not established prejudice. Tjong timely appealed the denial of her motion to reopen.

II.

We generally review the BIA's denial of a motion to reopen for abuse of discretion. *INS v. Abudu,* 485 U.S. 94, 107 (1988); *Fang Huang v. Mukasey,* 523 F.3d 640, 654 (6th Cir. 2008). However, an alien's claim of ineffective assistance of counsel is reviewed *de novo. Allabani v. Gonzales,* 402 F.3d 668,676 (2005) (citing *INS* v, *Doherty,* 502 U.S. 314, 321-22 (1994)).

III

Aliens in removal proceedings are entitled to due process of law guaranteed them by the Fifth Amendment to the United States Constitution.[1] *Sako* v. *Gonzales.* 434 F.3d 857, 859 (6th Cir. 2006); *Huicochea-Gomez* v. *INS.* 237 F.3d 696, 699 (6th Cir. 2001). "Ineffective assistance of counsel violates an alien's due process rights." *Hamid* v. *Ashcroft,* 336 F.3d 465,468 (6th Cir, 2003). To establish a due process violation because of ineffective assistance of counsel, an alien must first comply with the procedural requirements set forth in *Lozada. Lazar* v. *Gonzales,* 500 F 3d 469, 476 (6th Cir, 2007). Second. the alien must show that counsel's

[1]The government's argument that "no Fifth Amendment due process right to effective assistance of counsel exists in immigration proceedings" has been soundly rejected by this court. *Al Roumy* v. *Mukasey,* 290 F. App'x 856.862 n.3 (6th Cir. 2008) (collecting cases). Although the Attorney General's recent decision to the contrary has invited us to reconsider the question, *see Matter of Compean,* 24 1. & N. Dec. 710, 730 n.8 (AG 2009). that decision is not retroactive. We therefore decline to do so here.

ineffective assistance "prejudiced him or denied him fundamental fairness." *Sako,* 434 F.3d at 859.

A.

Under *Lozada,* an alien who claims ineffective assistance of counsel is required:

> (1) to file an affidavit stating his agreement with former counsel with respect to the actions to be taken on appeal and what counsel did [or] did not represent to the alien in this regard; (2) to show that former counsel was informed of the allegations and was given an opportunity to respond; and (3) to state whether a complaint has been filed with appropriate disciplinary authorities regarding the allegedly ineffective representation.

Sswajje v. *Ashcroft.* 350 F.3d 528, 533 (6th Cir. 2003) (citing *Lozada,* 19 I. & N. Dec. at 639).

Here, Tjong submitted the following proof on her obligations under *Lozada:* (1) a letter to Flowers dated August 28, 2007, stating that she had not received a letter from him indicating that her BIA appeal was denied and requesting the return of her file; (2) a certified mail receipt dated August 28, 2007; (3) a personal money order for $20.00 payable to Flowers, presumably to cover the cost of returning the file; (4) a letter dated September 15,2007, to the State Bar of Tennessee, jndicating that Tjong wanted to file a complaint against Flowers; (5) an affidavit stating that Tjong called Flowers repeatedly but ceased, on the assumption that he would contact her if the BIA took any action on her case, after Flowers threatened to charge her a consultation fee; and (6) a

letter to the BIA dated September 14,2007, to the same effect as the affidavit.

Tjong fails the first prong of *Lozada* because she never filed an affidavit stating her agreement with Flowers regarding the actions to be taken on appeal and what Flowers did or did not represent to her about the same. *See Hamid,* 336 F.3d at 468. Additionally, Tjong fails the second prong of *Lozada* because she cannot show that she informed Flowers about the allegations or gave him an opportunity to respond. The only proof on this point was the August 28 letter to Flowers, which reads in relevant part:

> I would like to have all my files mailed to me as soon as possible. My A number is A# 098-701-923. I renewed my working permit one month ago, and found out that my case has been denied since 5/31/07. I have not received any letters from you stating that my case has been denied.

The letter does not inform Flowers of Tjong's intent to file a disciplinary complaint against him for ineffective assistance. To the contrary, the letter concludes "Thank you for your help all this time." Therefore, the letter cannot be said to inform Flowers of the allegations against him. Because Tjong failed to comply with *Lozada,* she forfeited her ineffectiveness claim. *See Pepaj v. Mukasey, 509* F.3d 725, 727 (6th Cir. 2007) ("An alien who fails to comply with *Lozada's* requiremets forfeits her ineffective-assistance-of-counsel claim.") (citing *Hamid,* 336 F.3d at 469); *Nikollbibaj v. Gonzales,* 232 F. App'x 546, 555 (6th Cir. 2007) (same); *see, e.g.* , *Sswajje,* 350 FJd at533 (refusing to consider

ineffectiveness claim where alien did not comply with *Lozada).*

B.

Even if Tjong had complied with *Lozada,* she would still have to show prejudice or a denial of fundamental fairness to establish a due process violation. Prejudice means that, but for counsel's ineffective assistance, the result of the proceedings would have been different. *See Gishta v. Gonzales,* 404 F.3d 972,979 (6th Cir. 2005). Loss of Tjong's right to appeal does not, without more, establish prejudice. *Sako,* 434 F.3dat 865; *see, e.g., Muhameti v. Gonzales,* 230 F. App'x 551, 553- 54 (6th Cir. 2007) (citing *Ljucovic v. Gonzales,* 144 F. App'x 500, 504-05 (6th Cir. 2005)). Rather, Tjong must show that she "would have been entitled to continue residing in the United States." *Denko* v. *INS,* 351 F.3d 717, 724 (6th Cir. 2003) (quoting *Huicochea-Gomez,* 237 F.3d at 699).

Tjong argues that she suffered prejudice because "her right to appeal was jeopardized" by Flowers's failure to notify her of the BIA' s decision. As indicated above, however, "loss of a right to appeal alone" is not sufficient to establish prejudice. *Muhameti,* 230 F. App'x at 553-54; *Ljucovic,* 144 F. App'x at 504-05. Tjong has not provided any reason, such as new evidence or discrimination on the part of the IJ or BIA, to question the denial of her petition on the merits. *See Sako,* 434 F.3d at 865-66. Therefore, she has not shown-or even argued-that she would have been entitled to remain in the United States, as required to establish prejudice.

Fundamental unfairness means that the removal proceedings were so deficient "such as might have led to a denial of justice." *Ndrecaj* v. *Mukasey,* 522 F.3d 667,673 (6th Cir. 2008) (quoting *Huicochea-*

Gomez, 237 F.3d at 699). In an ineffective assistance case, prejudice and fundamental fairness are "analogous." *Sako,* 434 F.3d at 863-64. Consequently, for the same reasons Tjong failed to establish prejudice, she also failed to establish fundamental unfairness that would violate due process.

C.

Finally, Tjong argues that she is entitled to equitable tolling. Equitable tolling may allow a petitioner to file an otherwise untimely motion to reopen with the BIA when the delay is caused by counsel's ineffective assistance. *Barry* v. *Mukasey,* 524 F.3d 721, 724 (6th Cir. 2008); *Harchenko* v. *INS,* 379 F.3d 405, 409-10 (6th Cir. 2004). In this case, however, the BIA *accepted* Tjong's untimely motion to reopen, but it dismissed the motion on the merits. The untimeliness of the motion, therefore, played no role in the BIA' s decision to dismiss it. Tjong's argumentthat equitable tolling should apply in these circumstances is without consequence.

IV.

For the foregoing reasons, we affirm the denial of Tjong's motion to reopen.

U.S. Department of Justice
Executive Office for Immigraton Review

Decision of the Board of Immigration Appeals
Falls Church. Virginia 22041

File: A98 701 923 - Memphis, TN
Date: MAR 25 2008

In re: SANSAN DEWI CHANDRA TJONG

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DRS: John Cook, II
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM. This case was last before the Board on May 31, 2007, when we dismissed the

[1] We note that attorney Cindy Chang filed the motion on the respondent's behalf. However, the attorney failed to file a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27). As such, the respondent shall be treated as proceeding pro se. We will provide the attorney with a courtesy copy of this decision.

respondent's appeal of an Immigration Judge's denial of her application for asylum, withholding of removal, and protection under the Convention Against Torture. On September 24, *2007,* the respondent submitted a motion to reopen, which the Department of Homeland Security opposes. The motion is denied.

In her motion the respondent contends former counsel afforded her ineffective assistance by failing to notify her of the Board's adverse decision. As such, she maintains she was precluded from filing a timely motion to reconsider the Board's decision, and a timely appeal to the United States Court of Appeals for the Sixth Circuit. The respondent contends she submitted a complaint against former counsel with the appropriate bar authorities, and informed her former attorney of the allegations against him. The evidence provided by the respondent in support of her motion includes a cover letter to the Tennessee state bar stating she wished to file a formal complaint, and which references an affidavit, which is also of record. She further provided a statement dated September 14, 2007, regarding her interactions with former counsel, a copy of a Notice of Decision regarding an application for employment authorization, an August 28, 2007, letter to former counsel requesting return of her file and noting he did not inform her of the denial of her appeal, a copy of a certified mail receipt containing no address, a copy of a money order receipt to respondent's former counsel, and a copy of an envelope addressed to former counsel.

It is unclear, in light of this evidence, if the respondent has complied with the requirement that

she inform former counsel of the allegations she is lodging against him. The only letter addressed to him is the one requesting return of the respondent's file. Thus, this evidence fails to establish the respondent has complied with the requirements for the filing of a claim of ineffective assistance of counsel. *See Sako v. Gonzales,* 434 FJd 857, 863 (6th Cir. 2006) (noting that *Matter of Lozada,* 19 I&N Dec. 637,639 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988) requires "(1) that the motion be supported by an affidavit detailing counsel's failings, (2) that counsel be informed of the allegations, and (3) that the motion show that disciplinary charges have been filed with the appropriate authority").

Furthermore, in addition to meeting the *Matter of Lozada* procedural demands, a respondent raising a due process claim based on ineffective assistance of counsel "carries the burden of establishing that [counsel's ineffective assistance] prejudiced him or denied him fundamental fairness." *Huicochea-Gomez v. INS,* 237 F.3d 696, 699 (6th Cir. 2001). "Ineffective assistance of counsel in a deportation proceeding will rise to the level of a due-process violation under the Fifth Amendment only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Denko v. INS,* 351 F.3d 717, 723 (6th Cir. 2003). Therefore, to establish a due process violation based on ineffective assistance, the alien must show that "but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States." *Sako* v. *Gonzales. supra* at 864. Thus, "the key to due process analysis in these cases is the effect on the outcome of the underlying claim." *Id.* at 865.

Here, as the Department of Homeland Security notes, the respondent has provided nothing regarding the basis for any motion to reconsider and/or circuit court appeal she would have filed, but for the expiration of the relevant filing deadlines. She has not indicated in what manner the Board's decision was erroneous, nor stated what arguments and/or evidence she intended to proffer in either the motion or appeal. As the respondent has not shown she suffered any prejudice by former counsel's actions or inactions, her claim of ineffective assistance fails and reopening is otherwise not warranted.

Accordingly, the respondent's motion to reopen is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A98-701-923 - Memphis

Date: MAY 3 1 2007

In re: SANSAN DEWI CHANDRA TJONG

IN REMOVAL PROCEEDINGS

APPEAL

ON EEHALF OF RESPONDENT:
Darnell T. Flowers, Esquire

ON BEHALF OF DHS: Scott D. Gordon
Assistant Chief Counsel

ORDER:

PER CURIAM. We agree with the Immigration Judge that the respondent is ineligible for asylum because she failed to timely file her asylum application or establish either the existence of changed circumstances or extraordinary circumstances which would excuse her untimely filing (IJ. at 5-6). *See* sections 208(a)(2)(B) and (D) of the Immigration and Nationality Act. On appeal, the

respondent has not contested the denial of her asylum application on the 1-year ground.

The respondent argues for the first time in her Notice to Appeal that she suffered persecution and has a well founded fear of persecution on account of her membership in a particular social group. She defined the particular social group as "Chinese ethnic young women in Indonesia." However, as noted above, the respondent is ineligible for asylum. She has not demonstrated eligibility for withholding of removal based upon "membership in a particular social group," or any of the other protected grounds at section 241 (b)(3)(A) of the Act. *See Amir* v. *Gonzales.* 467 F.3d 921 (6th Cir. *2006); Matter of A-M-,23* I&N Dec. 737, 741-42 (BIA 2005). Finally, the respondent has also not challenged the Immigration Judge's denial of the application for protection under the Convention Against Torture. Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of I 0 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

IMMIGRATION COURT
167 N. MAIN STREET, ROOM 460
MEMPHIS, TN 38103

In the matter of

Case No.: A71-822-770

TJONG, SANSAN DEWI CHANDRA
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IIMMIGRATION JUDGE

This is a summary of the oral decision entered on January 24, 2006.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to
or in the alternative to

[ ] Respondent application for voluntary departure was denied and respondent was ordered removed to
Or in the alternative to

[x] Respondent application for voluntary departure was granted until March 27, 2006 upon posting a bond in the amount of $ 500.00 by January 31, 2006
with an alternate order of removal to Indonesia

APPENDIX E

Respondent's application for:

[x] Asylum was ( ) granted (x) denied ( ) withdrawn

[x] Witholding of removal was ( ) granted (x) denied ( ) withdrawn

[ ] A waiver under section 212 (h) was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under section 240A (a) was ( ) granted ( ) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under section 240A (b) (1) was ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under section 240A (b) (2) was ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of status under section _____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[x] Respondent's application of (x) withholding of removal ( ) deferral of removal under article III of the Convention Against Torture was ( ) granted (x) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under Section 246.

[ ] Respondent is admitted to the United States as A _____ until _____

[ ] As a condition of admission, respondent is to Post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on

discretionary relief for failure to appear as ordered in the Immigration judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other:

Date: Jan 24, 2006

CHARLES E. PAZAR
Immigration Judge

Appeal: Waived / Reserved (Checked) Appeal Due by:

Feb 23, 2006

ALIEN NUMBER: 98-701-923

ALIEN NAME: TJONG, SANSAN DEWI CHANDRA

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial officer [x] ALIEN'S ATT/REP [X] INS
DATE: 1/24/2006 BY: COURT STAFF CEP
ATTACHMENTS: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW UNITED STATES IMMIGRATION
COURT
Memphis, Tennessee

File No.: A 98 701 923 January 24, 2006

In the Matter of
SANSAN DEWI CHANDRA TJONG
Respondent

IN REMOVAL PROCEEDINGS

CHARGE:
Section 237(a) (1) (C) (i) of the Immigration and Nationality Act, nonimmigrant who has failed to maintain or comply with the conditions of her nonimmigrant status.

APPLICATIONS:
Asylum pursuant to Section 208(a) of the Immigration and Nationality Act;

Withholding of removal to Indonesia pursuant to Section 241(b) (3) of the Immigration and Nationality Act;

Protection under Article 3 of the United Nations Convention Against Torture; and

Voluntary departure.

APPENDIX F

ON BEHALF OF RESPONDENT:
T. Darnell Flowers

ON BEHALF OF DHS:
John F. Cook, II

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is an unmarried female, 26 years of age, a native and citizen of Indonesia. Based upon the admission made before the Immigration Court previously, respondent admitted and conceded the charge and the Court sustained that charge.

Statement of the Case

Exhibit 2 is the application for asylum, withholding of removal, and for Torture Convention relief, commonly known as a Form 1-589, which respondent filed initially with the Department of Homeland Security and which has been referred to the Memphis Immigration Court. Attached thereto are documents in support of her application including a personal statement. The International Religious Freedom Report for the year 2004 for Indonesia is Exhibit 3, and the Human Rights Report for Indonesia for the year 2004 is Exhibit 4. Respondent was the only witness in support of her application.

Respondent testified that she is an ethnic Chinese native and citizen of Indonesia. She testified that she is Buddhist but attended a Christian school in Indonesia. She testified that when she was in middle school in the year 1990 through 1993, she was taunted and apparently inappropriately touched by people she described as native Indonesians.

Respondent stated in her personal statement and also testified that in April 1995 a group of person threw stones at her high school. She principal called the police and when the police car arrived the assailants dispersed.

In another incident described in the personal statement and testified about by respondent today, respondent was driving home in August 1997 from actually getting her visa at the United States Embassy in Jakarta. She stated that "a lot of natives" spread nails on the road and when she got a flat tire they pretended to help her but in reality stole the contents of her vehicle. Respondent admitted on cross-examination that because of the place where the nails were spread which was in a primarily Indonesian and not Chinese neighborhood, anybody driving by would have his or her tires punctured, but respondent steadfastly maintained that only the Chinese travelers had their goods stolen. This is the only incident which is corroborated in any way and that is by the statement by respondent's friend attached to her application for asylum. Her friend states that she was with respondent and that the incident really did happen. The friend's name is Mona Thung and she is a lawful permanent resident of Australia. Ms. Thung's statement is not under oath and of course she is unavailable for cross-examination, so her corroboration is accorded little weight.

Respondent admitted on cross-examination that her parents are both alive and living in Indonesia as is her brother. There are no statements that the Court has found from respondent's siblings concerning any of the incidents in question.

Respondent testified that she returned to Indonesia in 2000 in order to renew her visa. She

further bases her fear of returning to Indonesia on an incident in which she was in a cab driving through a demonstration in front of the governor's office in Jakarta, which is several buildings away from the United States Embassy in that city. Apparently a group of petty-cab drivers were demonstrating and they knocked on the doors and windows of respondent's cab and this scared the respondent, but she testified that the cab driver got her safely to the United States Embassy and apparently she got home with no problem. There is no indication that respondent was targeted because of her Chinese ancestry and was anything other than a bystander who had a very tangential brush with an urban demonstration.

Respondent is a graduate of the University of Central Arkansas. She first came to the United States in 1997 as an F-1 student and graduated and then pursued optional practical training. The documents attached to her application at Exhibit 2 state that the respondent was authorized to complete optional practical training and was authorized to do that from February 15, 2002 to February 15, 2003. Respondent was cross-examined concerning this and she admitted that is what her 1-20 said. There is no evidence that her OPT was extended. Respondent filed her application for asylum in October 2004.

Respondent testified that, notwithstanding her long time in the United States and her apparent facility in English, she did not know about asylum and did not file her application until her friend had been granted asylum.

On cross-examination, the respondent admitted that a Buddhist holiday which is the most important holiday in the Buddhist calendar is recognized to be celebrated in Indonesia and she did

not know that the Indonesian government has permitted celebration of Chinese New Year.

Findings of Fact, Conclusions of Law and Statement Relevant Law

Conclusion of Law 1: The application is untimely.

The first issue to be resolved by the Court is whether respondent's application was timely filed. The statute requires an asylum applicant to file her application within one year of her arrival in the United States unless her lateness is excused by an extraordinary circumstance. Section 208(a) (2) (D) of the Act. Regulations found at 8 C.F.R. Section 1208.4(b) set out some definitions of the term "extraordinary circumstance." 8 C.F.R. Section 108.4(a) (C) (iv) describes one such circumstance in which the applicant maintained ... nonimmigrant status until a reasonable period before the filing of the asylum application.

The Court finds on this record that an unreasonable amount of time, given the facts and circumstance of the case, transpired between the time that respondent fell out of her nonimmigrant status in February 2003 and the time she applied for asylum in October 2004. The Court agrees with the Government's characterization of the respondent as a well-educated and intelligent woman who is obviously capable in the English language since she graduated from an institution of higher learning and completed OPT in the United States.

To the extent that respondent argues that subsequent events in Indonesia such as the communal riots in 1998 may have affected the timeliness of her application, the Court finds that her

situation is sufficiently like that in Matter of A-M-, 23 I&N Dec. 737 (BIA 2005), to find that there is no extraordinary circumstance in this case. In that case, the Board of Immigration Appeals held that reliance by an Indonesian asylum seeker on the events surrounding the nightclub explosion in Bali did not excuse the timeliness of that applicant's filing.

Nevertheless, should the panel of the Board of Immigration Appeals which will examine this case conclude that respondent has demonstrated the requisite extraordinary circumstances, the Court will examine the application under both the well-founded fear theory of asylum and the more likely than not standard of withholding of removal.

Finding of Fact I: Respondent is credible.

The Court will credit the respondent because her testimony is, while self-serving and uncorroborated, internally consistent and consistent with the application for asylum. Yu v. Ashcroft, 364 F.3d 700 (6th Cir. 2004).

Conclusion of Law II: Respondent is not eligible for asylum or withholding of removal.

At the outset, the Court notes the utter lack of meaningful corroboration in this case. Corroboration consists only of an unsworn letter from her friend and no affidavit or letter from her parents concerning what might have happened to them or their understanding of what happened to the respondent. Indeed, beyond respondent's testimony and the unsworn statement of her friend in Australia, we have no evidence that respondent is even of Chinese ancestry. Corroboration being a requirement and not

an option, Dorosh v. Ashcroft, 398 F.3d 379 (6th Cir. 2004), the Court notes that respondent has not met her burden of proof.

Moving beyond infirmities of proof, the Court finds that respondent has suffered no past persecution in Indonesia. See generally, Pilica v. Ashcroft, 388 F.3d 941, 958 (6th Cir. 2004). Respondent was harassed and perhaps even rattled somewhat, but she was not persecuted. Accord, Matter of A-M-, supra.

Respondent bases her application on incidents involving nails in the road in August 1997 and a jostling in a cab in 2000 as well as an incident in 1995 when her high school was beset by perhaps the word would be hoodlums. As to the nail incident, respondent presents no reliable evidence that she was targeted because of her ethnicity beyond her self-serving testimony and that of her friend in an unsworn declaration. Respondent admitted on cross examination that anybody driving through that area would have their tires punctured. This to the Court seems like a dangerous and rather stupid game played by unruly youths, but not evidence of persecution on account of race, religion, nationality, political opinion or membership in a particular social group as required by cases such as Koliada v. INS 259 F.3d 482, 487 (6th Cir. 2001), and INS v. Elias-Zacarias, 502 u.S. 478 (1992) .

Indeed, the nail incident and the incident involving hoodlums attacking the high school stem more from crime rather than anything else from the evidence presented to the Court. Fear of crime is not a basis for asylum. See generally OlivaMuralles v. Ashcroft, 328 F.3d 25 (1st Cir. 2003), which, while not binqing on this Court, is nonetheless instructive. Paraphrasing this Judge's colleague in Boston, the

Court noted the decency of the applicant before him and the understanding of the fear of that person, but the failure of the applicant to state a claim upon which relief could be granted.

The Court notes that respondent returned to Indonesia in 2000. This was after the incident with the nails in the road and after her high school was set upon by people throwing rocks. Such a return, even to get a visa, would undercut the well-foundedness of the respondent's fear. Any further claim to an objectively well-founded fear is vitiated by the fact that nothing happened to the respondent except being jostled in an urban demonstration when she was in Jakarta, Indonesia in 2000. Again, the Court notes that there is no evidence that respondent was targeted because of her ethnicity. Taken together, the Court finds that respondent has failed to demonstrate a well-founded fear of persecution. The background material at Exhibits 3 and 4 indicate that the Indonesian government is increasingly trying to protect the rights of ethnic and religious minorities and the Indonesian government has allowed celebration of certain holidays by the Chinese minority.

In reality, this is an application for withholding of removal, and the Court finds, as did the Board in Matter of A-M-, supra, that name-calling by native Indonesian persons and even rock-throwing fail to meet the burden of proof set out in 8 C.F.R. Section 1208.16(b) (2). As noted, the Indonesian government is seeking to protect the rights of its minorities and respondent has failed to show on this record that is more likely than not that she would be persecuted in Indonesia.

Respondent also makes a Torture Convention claim. The Court finds that the respondent has not

met her burden of showing it is more likely than not that she would be persecuted in Indonesia. She fears a group which the government of Indonesia, by her lights, cannot or will not control, but she does not fear torture by an agent of the Indonesian government or with the acquiescence of the Indonesian government. Thus, she has not met her burden of showing eligibility for Torture Convention Relief. Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001). Conclusion of Law III: Respondent is eligible for voluntary departure.

The Court grants voluntary departure upon the terms and conditions set forth below. The Immigration Judge finds that respondent is worthy of a favorable exercise of discretion and will grant the maximum amount of voluntary departure time and the minimum bond as set forth below.

Taken together, the Court enters this order:

ORDER

IT IS ORDERED that respondent's application for asylum under Section 208(a) of the Immigration and Nationality Act is denied;

IT IS FURTHER ORDERED that respondent's application for withholding of removal to Indonesia pursuant to Section 241 (b) (3) of the Immigration and Nationality Act is denied;

IT IS FURTHER ORDERED that respondent's request for protection under Article 3 of the United Nations Convention Against Torture is denied;

IT IS FURTHER ORDERED that respondent be granted voluntary departure up to and including March 27, 2006. Respondent shall post a bond of five hundred dollars with the Department of Homeland Security by January 31, 2006.

IT IS FURTHER ORDERED that, if respondent does not post this bond, or does not depart the United States as ordered within the date set by this Court or as extended by the Board of Immigration Appeals, the order of voluntary shall automatically convert to an order of removal to Indonesia. Respondent will be ineligible for voluntary departure, adjustment of status, and cancellation of removal for ten years if she does not depart the United States and she shall be subject to civil penalties of not more than five thousand dollars.

CHARLES E. PAZAR
Immigration Judge